

Case Summary

The State appeals the trial court's grant of Damon Johnson's motion to suppress. We affirm.

Issue

The State raises one issue, which we restate as whether law enforcement officers had reasonable suspicion to conduct a trash search at Johnson's residence.

Facts

On April 24, 2006, Detective Stephon Blackwell of the Marion County Police Department appeared before the trial court to request a search warrant for 703 East 27th Street in Anderson. During the previous week Detective Blackwell received two anonymous phone calls from the same person who claimed to have seen Johnson cutting up large amounts of powder cocaine in the garage at 703 East 27th Street. Just two days earlier, a "reliable source of information" told Detective Blackwell that Johnson was selling cocaine from the residence. App. p. 15. Detective Blackwell confirmed that the informant saw Johnson selling cocaine, but the record is void of any information to suggest when the informant saw the illegal activity. The confidential informant had been used by Detective Blackwell and another officer, Detective Kevin Early, in the past. This person had provided Detective Early with information that led to felony arrests.

Based on the anonymous phone calls and the information from the informant, Detectives Blackwell and Early conducted a trash pull at the residence on the morning of April 24, 2006. They discovered marijuana, baggies with white powder that tested positive for cocaine, and mail with Johnson's name and the address of the residence.

Based on this information, the trial court found that there was probable cause for the issuance of a search warrant. Officers executed the search warrant that day and found marijuana, cocaine, and digital scales. On May 12, 2006, the State charged Johnson with Class D felony possession of marijuana with the intent to deliver, Class A felony possession of cocaine with the intent to deliver, Class D felony maintaining a common nuisance, and alleged that Johnson was a habitual offender.

Johnson filed a motion to suppress on September 28, 2007, and the trial court held a hearing on November 11, 2007. Johnson argued there was not reasonable suspicion to conduct the trash pull and without the trash pull items, there was not sufficient probable cause to issue the warrant. On March 12, 2008, the trial court granted the motion to suppress. The appeal followed.

Analysis

The State is appealing from a negative judgment when it appeals from the trial court's grant of a motion to suppress evidence. State v. Rager, 883 N.E.2d 136, 139 (Ind. Ct. App. 2008). The State has the burden of demonstrating that the evidence is without conflict and the evidence with all reasonable inferences lead to a conclusion opposite that of the trial court. Id. We consider only evidence most favorable to the judgment, and we do not reweigh the evidence or judge the credibility of witnesses. Id.

In Litchfield v. State, 824 N.E.2d 356 (Ind. 2005), our supreme court considered the propriety of trash searches by police. It concluded:

A search of trash recovered from the place where it is left for collection is permissible under the Indiana Constitution, but only if the investigating officials have an articulable basis

justifying reasonable suspicion that the subjects of the search have engaged in violations of law that might reasonably lead to evidence in the trash.

Litchfield v. State, 824 N.E.2d at 357. The court set out a two-part test for determining whether a trash search is reasonable. First, the search must be based on an “articulable individualized suspicion that illegal activity is or has been taking place, essentially the same as is required for a ‘Terry stop’ of an automobile.” Id. at 364. Second, the “trash must be retrieved in substantially the same manner as the trash collector would take it.” Id. at 363.

The manner of the retrieval of Johnson’s trash was not found to be improper and is not contested. In granting the motion to suppress, the trial court determined that the State failed to demonstrate it had reasonable suspicion to pull Johnson’s trash. The trial court gave no credence to the anonymous tips and concluded that although the second informant may have been reliable, this information did not provide specifics that could be confirmed.

The determination of whether reasonable suspicion existed is reviewed de novo on appeal. Teague v. State, 891 N.E.2d 1121, 1128 (Ind. Ct. App. 2008). Reasonable suspicion exists if the facts known to an officer and the reasonable inferences therefrom would cause an ordinarily prudent person to believe that criminal activity has or is about to occur. State v. Lefevers, 844 N.E.2d 508, 513 (Ind. Ct. App. 2006), trans. denied (citing United States v. Mendenhall, 446 U.S. 544, 553, 100 S. Ct. 1870, 1877 (1980)). Id. “Although reasonable suspicion requires more than inchoate and unparticularized hunches, it is a less demanding standard than probable cause and requires considerably

less proof than that required to establish wrongdoing by a preponderance of the evidence.” Id. A reasonable suspicion determination is made on a case-by-case basis by looking at the totality of the circumstances. Id.

Any reasonable suspicion that Detectives Blackwell and Early may have had that Johnson was involved in criminal activity would have originated with the tipsters. An anonymous tip, standing alone, is rarely sufficient to establish reasonable probability. See Hardister v. State, 849 N.E.2d 563, 570 (Ind. 2006). “Corroboration is ordinarily necessary where nothing the tipster said shows either reliability or the informant’s basis of knowledge.” Id. “[A]n anonymous tip is not likely to constitute the reasonable suspicion necessary for a valid Terry stop unless ‘significant aspects’ of the tip are corroborated by the police.” Powell v. State, 841 N.E.2d 1165, 1168 (Ind. Ct. App. 2006) (quoting Lamkins v. State, 682 N.E.2d 1268, 1271 (Ind. 1997)). Here, the anonymous tip consisted of two phone calls to Detective Blackwell from the same person who claimed to have seen Johnson “cutting up large quantities of powder cocaine in the garage.” App. p. 14. The police made no independent observations nor uncovered any evidence that confirmed or corroborated this anonymous tip.

Later that week, an allegedly reliable source told Detectives Blackwell and Early that Johnson was selling cocaine from the residence. No details of the time, manner, or participants of the sale were included.

Q: And that person said they had seen Damon Johnson selling cocaine out of that location?

A: Correct.

App. p. 16. This source had previously provided Detective Early with information that led to felony arrests. “[A] tip from an identified and known informant can provide reasonable suspicion of criminal activity to justify a Terry stop when there are sufficient indicia of reliability.” Membres v. State, 889 N.E.2d 265, 281 (Ind. 2008).

The indicia of reliability for a tip can be established in a number of ways, including whether: (1) the informant has given correct information in the past, (2) independent police investigation corroborates the informant’s statements, (3) some basis for the informant’s knowledge is demonstrated, or (4) the informant predicts conduct or activity by the suspect that is not ordinarily easily predicted.

Id.

Officer Blackwell indicated that this informant had given correct information in the past—information that led to felony arrests. Johnson contends that this point is invalid because the informant provided the information for another detective’s arrests, not for the testifying officer. The testifying officer, Detective Blackwell, explained that both he and Detective Early have used the informant and that he knows the informant. The informant’s reliability was established collectively to detectives Early and Blackwell, not necessarily to Blackwell’s individual arrests. The fact that Detective Blackwell testified rather than Detective Early does not negate the informant’s prior reliability.

Still, the informant did not say when Johnson had sold cocaine from the house or if Johnson was currently or regularly selling cocaine in the house. We assess the age of information as an element contributing to the totality of the circumstances. Teague, 891 N.E.2d at 1130. “The general rule is that stale information cannot support a finding of probable cause, but rather, only gives rise to mere suspicion.” Seeley v. State, 782

N.E.2d 1052, 1060 (Ind. Ct. App. 2003), trans. denied. We cannot even consider whether the information may have been stale, or how stale it could have been, because we have no timeline to evaluate. Detective Blackwell only testified that the informant provided the information two days prior to the search warrant request. Nothing about the informant's tip pinpoints an actual date or time of the witnessed drug sale. We cannot assume that the witnessed sale happened recently just because the police had recently been in contact with the informant.

Although we make a reasonable suspicion determination from the totality of the circumstances, the tips here, even taken together, do not amount to sufficient reasonable suspicion. The first tip was not corroborated and because of its anonymous nature, does not merit much weight. The second tip from the reliable informant was vague as to the date of criminal activity. The informant may have given reliable information in the past, but the tip here was not corroborated by independent police investigation, nor did the informant provide any basis for his information. Unlike the informant in Teague, who actually went to the subject's residence on several occasions with a companion who purchased cocaine, the informant here did not indicate witnessing or participating in ongoing drug sales or at least the record is devoid of any information that indicates any of those facts. See Teague, 891 N.E.2d at 1130 (finding that detectives had sufficient reasonable suspicion of criminal activity to justify a trash search). The record in Teague also included more evidence relating to the reliability of the informant—specifically that informant had recently participated in an uncontrolled buy that led to a guilty plea, that the informant was not working off charges, and that the informant had provided reliable

information six or seven times in the last four to five years, the most recent within the last six months to year, and the information led to a number of drug-related arrests and convictions. The record here reveals only that the informant gave Detective Early information that led to felony arrests.

Considering our standard of review on appeal from this negative judgment, we cannot merely substitute our judgment for that of the trial judge. Our review of the evidence of reasonable suspicion does not reveal that it leads to the opposite conclusion than the trial court reached.

Conclusion

The trial court's decision to grant Johnson's motion to suppress on the grounds that the police lacked reasonable suspicion to perform a trash search is sound. We affirm.

Affirmed.

FRIEDLANDER, J., and DARDEN, J., concur.